Petition

81-1071

NO.

Office - Supreme Court, U.S.
FILED
DEC 9 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FRANCINE VANNIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented for Review

1. What is the legal standard for determining whether the testimony of a witness before a federal grand jury is adverse to the legal interests of her target spouse?

2. Whether a witness may properly decline to testify before a federal grand jury pursuant to the privilege against adverse spousal testimony where the witness' spouse is an acknowledged target of the grand jury investigation, the answers would tend to incriminate the witness, and the witness and her spouse are alleged co-conspirators in the unlawful activity under investigation?

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NO.

IN THE

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FRANCINE VANNIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Francine Vannier respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on November 10, 1981.

Opinion Below

The opinion of the Court of Appeals, which has not yet been reported, appears in the Appendix (A. 1a). The District Court entered judgment without opinion. Its order is included in the Appendix (A. 25a).

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 10, 1981 and this petition has been filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Provisions Involved

The privilege invoked by petitioner is the federal privilege against adverse spousal testimony (sometimes hereinafter "spousal privilege"). The statute involved is 28 U.S.C. 1826(a):

> "Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
>
> (1) the court proceeding, or
>
> (2) the term of the grand jury, including extensions,
>
> before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."

Statement of the Case

Petitioner was adjudged in civil contempt pursuant to 28 U.S.C. Section 1826 for failing to answer seven questions before a federal grand jury. The contempt judgment of the District Court was ultimately affirmed by a divided Court of Appeals, as to five of the questions. Petitioner seeks review by writ of certiorari of this affirmance. The case arises as follows:

Petitioner and her husband, Merrell Vannier, were jointly served with subpoenas requiring their respective appearances on June 10, 1981 before a federal grand jury sitting in the Middle District of Florida, Tampa Division. The grand jury is investigating allegations that members and adherents of the Church of Scientology unlawfully planned and implemented actions to harass and silence critics of the Church, in violation of 18 U.S.C. Sections 1341, 1952 and 371.

It is alleged that when the Church learned Gabriel Cazares, vocal opponent of the Church in Clearwater, Florida, would be a candidate for election to the U.S. House of Representatives in November, 1976, it undertook to discredit Cazares' candidacy and otherwise minimize the impact of his criticisms of the Church. Anti-Cazares activities assertedly included:

a. staging a faked hit-and-run accident in Washington, D.C. in which Cazares, married, was in the company of a woman;

b. framing Cazares for bigamy by bribery and falsification of records;

c. infiltrating his election campaign with a Church undercover operative who would gather intelligence for the Church and undermine his campaign;

d. causing Cazares to retain an attorney in litigation against the Church of Scientology who, unknown to Cazares, was a Church member. The attorney allegedly disclosed confidential communications to the Church.

A second well known Church critic was the *St. Petersburg Times*. Church members assertedly planned to have a person posing as an organized crime messenger deliver an apparent bribe to a *Times* reporter. It is also alleged a Church member infiltrated a law firm representing the *Times* in litigation with the Church and stole confidential legal files relating to that litigation.

Petitioner's husband is an acknowledged subject or target of the grand jury investigation. Mr. Vannier's counsel was so informed by the government and the majority and dissenter below so found. It is alleged Mr. Vannier was and continues to be an active Scientology member, that he was involved in an attempt to infiltrate the offices of the Florida State Attorney in July of 1976, that he gained unauthorized access to that office and stole a portable radio used to monitor office communications.

It is further alleged Mr. Vannier was the attorney who, as an undercover Church operative, sought to and did represent Cazares in his litigation with the Church, breached the attorney-client relationship by disclosing confidential communications to the Church and sought to have Cazares drop the litigation.

It is further alleged petitioner Francine Vannier was and is a member of the Church of Scientology; that she came to Pinellas County, Florida with her husband in 1975 as an undercover operative for the Church; that she was the Church member who infiltrated Cazares' election campaign; and that she aided Merrell Vannier's being retained by Cazares in the latter's litigation with the

Church, by suggesting her husband as an attorney to Cazares. It is also alleged petitioner was the Church member who infiltrated and stole confidential documents from a law firm representing the *St. Petersburg Times* in litigation with the Church.[1] She is an alleged co-conspirator.[2]

Francine Vannier and Merrell Vannier have been married since June, 1969. They reside together with their ten year old daughter in California.

When he appeared before the grand jury on June 10, Merrell Vannier was asked questions concerning his membership in and employment by the Church of Scientology and his employment in Florida as an attorney, particularly by Gabriel Cazares. Particularly noteworthy in respect to the instant petition, one question asked Mr. Vannier was: "In 1975, when you flew to Florida, did you come with your wife?" Mr. Vannier declined to testify on the ground that answering would tend to in-

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[1] The allegations concerning petitioner and her husband and the scope of the grand jury investigation are a matter of record in this case and have been widely reported in the press.

[2] "The Court: Let me ask you this: Could you make a statement as to whether or not you might consider whether she would ever be an unindicted co-conspirator of any kind?

"Mr. Bostic: We—would you repeat the question sir?"

"The Court: Whether or not you might consider whether or not she would ever be an unindicted co-conspirator of any kind in connection with this case?

"Mr. Bostic: There would be a chance that she could be, yes." Transcript, June 17, 1981, p. 124.

Before the grand jury, the government attorney informed petitioner it was "possible that an indictment could be forthcoming against you."

criminate him in violation of his Fifth Amendment privilege. The government did not challenge the correctness of Vannier's legal position, nor attempt to compel his testimony by granting him immunity.

Mrs. Vannier was then asked the following questions before the Grand Jury:

> "Mrs. Vannier, have you ever lived in Pinellas County, Florida?"
>
> "Are you now or have you ever been a member of the Church of Scientology?"
>
> "Are you now or have you ever been employed by the Church of Scientology?"
>
> "Do you know an individual by the name of Gabriel Cazares?"
>
> "Did you work in the Congressional election campaign of Gabe Cazares?"
>
> "If you worked in the election campaign of Gabe Cazares, were you doing so at the instructions of the Church of Scientology?"
>
> "Were you sent to Pinellas County, Forida as an undercover operator for an FSM[3] to work upon the campaign committee of Gabriel Cazares?"

Petitioner declined to testify on the ground *inter alia* her answers would tend to incriminate her husband. The District Court concluded Mrs. Vannier could not invoke the spousal privilege and adjudged petitioner in civil contempt.

The Court of Appeals initially reversed. On September 8, per Judges Hill, Fay and Anderson, it issued an order which provided in pertinent part:

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[3] This is shorthand for Field Staff Member of the Church.

> "The judgment of the District Court in case No. 81-5636 holding Francine Vannier in contempt is REVERSED and REMANDED for further proceedings.
>
> An opinion will follow. Judge Fay reserves the right to dissent from the judgment reversing Francine Vannier's conviction."

On November 3, however, the Court entered an order which provided:

> "On this Court's own motion, IT IS NOW ORDERED that the order of September 8, 1981 is vacated and set aside. Final judgment of this Court with opinion will issue in due course."

In a decision rendered November 10, a majority of the Court of Appeals (Judges Fay and Anderson) held petitioner could not properly assert the spousal privilege as to five of the seven questions. The judgment of the district court was therefore affirmed, except as to two questions held privileged.

Concurring in part and dissenting in part, Judge Hill concluded petitioner had properly invoked the spousal privilege as to all seven questions. He therefore would have reversed the District Court and upheld in full Mrs. Vannier's claim of privilege.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an issue important to the administration of federal proceedings which has not been, but should be, settled by this Court. The decision below is in conflict with *Appeal of Malfitano*, 633 F.2d 276 (3 Cir. 1980) and out of harmony with the import of this Court's decision in *Hawkins* v. *U.S.*, 358 U.S. 74 (1958). If allowed to stand, the majority's decision will substantially eviscerate the privilege against adverse spousal testimony in federal proceedings.

The privilege against adverse spousal testimony protects a witness in a federal proceeding from being compelled to give testimony which would incriminate his/her spouse. *Trammel* v. *U.S.*, 445 U.S. 40, 53 (1980).[4] The question presented here and decided by the Court of Appeals of the appropriate standard in determining whether a witness' testimony is adverse to the legal interests of their spouse has never been decided by this Court. The Court's sole discussion of this question appears in *Hawkins* v. *U.S.*, 358 U.S. 74, 79-81 (1958).[5]

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[4] The spousal privilege is distinguished from the so-called marital privilege which bars compelled disclosure of confidential communications between husband and wife. E.g., *Blau* v. *U.S.*, 340 U.S. 332 (1951). The marital privilege is not involved here.

[5] Most early cases dealt with whether a spouse was disqualified from testifying *for* her husband in a criminal proceeding against the latter. E.g., *Hendrix* v. *U.S.*, 219 U.S. 79, 91 (1911) and *Funk* v. *U.S.*, 290 U.S. 371 (1933). In *Stein* v. *Bowman*, 13 Pet. 207, 219-223 (1839) the question was whether a wife was competent to testify as to illegalities committed by her husband. The witness' testimony would plainly incriminate her husband; thus the question of the standard to be employed in making such a determination never arose. Likewise in *Trammel* v. *U.S.*, *supra*, no one disputed that the witness' testimony incriminated her spouse.

The issue is an important one which should be settled by this Court. See Sup. Ct. Rule 17.1(c). With the refinement in *Trammel* that the spousal privilege vests in the witness alone,[6] the question here is the basic one which will now be posed whenever the privilege is invoked, either in a federal trial or grand jury proceeding.[7]

The Court of Appeals below set out the applicability of the spousal privilege in the following terms:

> "It does not appear to the court that the Vanniers' marriage could be jeopardized or that Mr. Vannier's guilt could be indicated in any way by Mrs. Vannier's answering objective questions containing no reference to her husband." (A. 17a).

In short, if the questions on their face do not refer to the witness' spouse, the witness may not rely upon the privilege.

The basic error in the majority opinion, which has broad repercussions in defining the scope of the spousal privilege, is to treat the relationship of the questions to the non-witness spouse as a factual question, rather than as a question of law. Where a witness allegedly a co-conspirator of her spouse gives testimony incriminating herself, that testimony as a matter of law refers to her spouse and is adverse to his interests. Where the witness

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[6] In *Trammel*, the Court held a willing witness could not be prevented by the Court or by their spouse from giving testimony adverse to the spouse, but that an unwilling witness could not be compelled to do so. 445 U.S. at 53.

[7] It has been uniformly held that the privilege against adverse spousal testimony applies in grand jury proceedings. E.g., *Appeal of Malfitano*, 633 F.2d 276, 277 (3 Cir. 1980); *In re Snoonian*, 502 F.2d 110, 112 (1 Cir. 1974). And see Fed. Rule Evid. 1101(d).

has given testimony which, as a matter of law, provides the basis for an indictment of her husband, she will feel no less guilty nor her spouse no less upset because, as a factual matter, she did not refer to him in her testimony.

The decision below is in conflict with the approach of the U.S. Court of Appeals for the Third Circuit in *Appeal of Malfitano,* 633 F.2d 276 (3 Cir. 1980).[8] As here, the federal grand jury witness' husband was a target in a conspiracy investigation and the witness-wife an alleged co-conspirator. The conspiracy alleged involved corporate kickbacks to secure a loan. Invoking the spousal privilege, Mrs. Malfitano declined to answer questions concerning (a) corporate telephone records during the period of the alleged conspiracy and (b) discussions at a meeting presumably attended by her husband and others. The District Court adjudged her in civil contempt.

The Third Circuit reversed in full. It held Mrs. Malfitano had properly claimed the privilege because "all of the questions would seem to implicate her husband." *Id.* at 277. It reached this conclusion notwithstanding the fact that none of the questions referred to her husband. The Court thus necessarily rejected a 'facial reference' test. Rather it adopted a test which focuses on the *legal* relationship between the witness' testimony and her spouse:

> "He is the president of all of the corporations involved, and the questions about the June 15 meeting would implicate him either if he attended it or because it was held at one of the corporate offices." *Id.*

In short, the Third Circuit anticipated the approach followed by Judge Hill in dissent here but rejected by the Fifth Circuit majority.

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[8] A conflict in circuit decisions is a basic ground for a grant of certiorari. See Sup.Ct. Rule 17.1(a).

The test formulated by the majority below also appears inconsistent with *Hawkins* v. *U.S., supra.*[9] See Sup. Ct. Rule 17.1(c). The only factual issue in *Hawkins, a* Mann Act prosecution, 18 U.S.C. Section 2421, was whether Hawkins' dominant purpose in making a trip between Arkansas and Oklahoma was to facilitate the practice of prostitution in Oklahoma by the prosecutrix. Mrs. Hawkins testified only that she was the defendant's wife and that she had been a prostitute before she married Hawkins and at the time Hawkins took the prosecutrix to Tulsa. On its face, Mrs. Hawkins' testimony as to her own prostitution made no reference to Hawkins.[10] Moreover, it does not even appear Mrs. Hawkins was an alleged co-conspirator. Nevertheless, this Court concluded that admission of Mrs. Hawkins' testimony violated the spousal privilege and required reversal of Mr. Hawkins' conviction. 358 U.S. at 79-81.

The Fifth Circuit's test is even narrower than those set forth in the cases upon which the majority relied.

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[9] The question whether the admission of Hawkins' wife's testimony constituted reversible error was independent of the question whether the non-witness spouse could invoke the privilege to prevent a willing witness from testifying. Thus, *Trammel's* overruling of *Hawkins* on the latter issue leaves undisturbed this Court's discussion in *Hawkins* of the former.

[10] As stated by the Court of Appeals in *Hawkins*: "She did not testify at the instance of the government to any act or statement on the part of appellant relating to the transportation of the prosecutrix; did not testify that she ever saw appellant and the prosecutrix together at any time or place; did not testify that she ever saw the prosecutrix anywhere; did not testify that she ever saw appellant at Tulsa, at Fort Smith, or at Hot Springs; and did not testify to any act performed or any statement or admission made by him." 249 F.2d 735, 737 (10 Cir. 1957).

In *U.S.* v. *George,* 444 F.2d 310 (6 Cir. 1977), the court noted the question did not relate to the grand jury witness' wife, but also relied substantially on the fact Mr. George's wife was not the subject of the grand jury investigation. *Id.* at 314. Likewise in *U.S.* v. *Brown,* 605 F.2d 389 (8 Cir. 1979), while relying in part on its conclusion that the witness' testimony did not concern her spouse, the court also relied on the fact that husband and wife had not been together since two weeks after they were married. *Id.* at 396. Here Mr. Vannier is a target or subject of the grand jury investigation and the Vanniers have an ongoing, viable marriage.

Th Fifth Circuit did not hold the spousal privilege is *per se* inapplicable where the witness is an alleged co-conspirator of her spouse.[11] However, the narrow test it did formulate will render the spousal privilege virtually nugatory where the witness is an alleged co-conspirator of her spouse.

We respectfully note, contrary to the majority, that what is significant in determining applicability of the privilege is not the content of the questions, but the content of the answers. If the answers are adverse to the spouse's legal interests, the fact the questions do not refer to the spouse would appear largely beside the point.

Any prosecutor can frame questions in a conspiracy investigation so that neither the question nor the answer on its face refers to the witness' spouse, and yet the answers may plainly incriminate the spouse. As Judge Hill noted in dissent below:

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[11] Compare *U.S.* v. *Van Drunen,* 501 F.2d 1393 (7 Cir.) cert. den. 419 U.S. 1091 (1974) and *Trammel* v. *U.S.,* 583 F.2d 1166, 1168-1170 (10 Cir. 1978), aff'd on other grounds 445 U.S. 40 (1980) (co-conspirator may not invoke spousal privilege) with *Appeal of Malfitano,* 633 F.2d at 278-279 (spousal privilege available to co-conspirator).

> "Under the law of conspiracy, the acts of one co-conspirator in furtherance of the unlawful agreement are admissible against all, even in the absence of the other's approval of these overt acts. The overt act itself need not be criminal if it is in furtherance of the unlawful agreement, and it may occur before or after the others join the conspiracy." (A. 23a) (citations omitted.)

A witness may never mention or refer to her husband in giving testimony which incriminates herself. If the witness and her spouse are alleged co-conspirators, however, her self-incriminating[12] testimony will be adverse to her husband's legal interests just as much as where she did refer to him. The two examples cited by Judge Hill prove the point:

> "If, for example, Mrs. Vannier were to testify that she moved from California to Pinellas County, Florida with her husband in 1975, and the government proves that the purpose of the move was to engage in, as a field service member of the Church of Scientology, any of the alleged unlawful activities . . ., this overt act would provide evidence admissible against Mr. Vannier as an alleged co-conspirator.[13] Likewise, an affirmative answer by Mrs.

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[12] Absent a grant of immunity, petitioner would have been privileged to decline to testify under established Fifth Amendment case law. E.g., *Hoffman* v. *U.S.*, 341 U.S. 479, 486 (1951); *Blau* v. *U.S.*, 340 U.S. 159, 161 (1950). Neither the government nor the Courts below contended otherwise.

[13] As noted *supra*, Mr. Vannier was asked before the grand jury: "In 1975, when you flew to Florida, did you come with your wife?"

> Vannier that she infiltrated the election campaign of Gabriel Cazares would prove an act attributable to Mr. Vannier." (A. 23a)

The Fifth Circuit's own application of its test demonstrates that it provides inadequate scope to the spousal privilege and will lead to arbitrary, unpredictable results. The Court concluded petitioner need not answer the question: "Were you sent to Pinellas County, Florida as an undercover operator for an FSM to work upon the campaign committee of Gabriel Cazares?" This question has three components: (1) Did Mrs. Vannier live in Pinellas County? (2) Did she work on Cazares' campaign? and (3) Did she do so as an undercover operator for the Church? The Court of Appeals affirmed the District Court's order that petitioner must testify whether she had ever lived in Pinellas County, been a member or employee of the Church, knew Cazares or worked on his campaign. These questions, however, are nothing less than the foregoing impermissible question broken down into its component parts. The result under the Fifth Circuit's formulation is to allow the government to in essence obtain the information sought by the full question even while holding that question to be improper.[14]

What is needed is a standard which is uniform throughout the Circuits, which is sufficiently clear to provide guidance to the trial courts which must apply it and which adequately protects against the threat of disruption or de-

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[14] Because this was decided as a Fifth Circuit case, see Section 9(1) of Public Law 96-452 (October 14, 1980), and the Eleventh Circuit has determined to follow the precedents of the former Fifth Circuit, *Bonner* v. *City of Prichard*, 50 LW 2318 (11 Cir., 11/3/81) (*en banc*), the Court of Appeals decision is now controlling in both Circuits.

terioration of the marital relationship, which is the evil against which the spousal privilege seeks to guard. This is an appropriate case by which the Court may satisfy that need.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: Brooklyn, New York
December 9, 1981

Respectfully submitted,

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Certificate of Service

I James Reif, a member of the bar of the Supreme Court, hereby certify that in conformity with Supreme Court Rules 28.3 and 19.3 three (3) copies of the Petition for Writ of Certiorari herein were served by express mail postage prepaid by deposit with the U.S. Postal Service this 8 day of December, 1981 upon Solicitor General, Department of Justice, Washington, D.C. 20530

JAMES REIF

APPENDIX A

Opinion of the United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT*

UNIT B

No. 81-5602

IN RE: GRAND JURY PROCEEDINGS,
MITCHELL HERMANN, Witness,
Appellant.

• • •

No. 81-5636

IN RE: GRAND JURY PROCEEDINGS,
FRANCINE VANNIER,
Appellant.

Appeal from the United States District Court for the Middle District of Florida

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

Appendix A

November 10, 1981

Before HILL, FAY and ANDERSON, Circuit Judges.

PER CURIAM:

These consolidated appeals arise in the context of civil contempt convictions of two grand jury witnesses, Mitchell Hermann and Francine Vannier, who refused to answer questions before a federal grand jury. Before turning to the issues presented, we first review the facts leading to the convictions from which appeal is taken.

The grand jury before which witnesses Hermann and Vannier were subpoenaed to appear, sitting in the Tampa Division of the Middle District of Florida, is investigating allegations that members and employees of the Church of Scientology conspired and undertook to harass and silence critics of the church in central Florida.[1] In February 1980

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[1] Specifically, Scientologists allegedly planned:

(1) To discredit the congressional campaign of Gabriel Cazares, a former mayor of Clearwater, Florida who vociferously opposes the church, by

(a) staging a fake hit and run accident in Washington, D.C. which would compromise Cazares' reputation;

(b) framing Cazares with bigamy by bribery and falsification of records;

(c) infiltrating and undermining his campaign; and

(d) causing Cazares to retain a lawyer to represent him in litigation against the Church of Scientology who, unknown to Cazares, was a Scientologist;

(Footnote continued on following page)

witness Hermann had been subpoenaed to testify before a predecessor grand jury investigating the same allegations. After asserting his fifth amendment privilege against self-incrimination, Hermann was granted use immunity and ordered by the district court to testify.[2] In spite of this

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(Footnote continued from preceding page)

(2) To discredit another church critic, the St. Petersburg Times, by

(a) having a Scientologist pose as a messenger for organized crime and deliver an apparent bribe to a reporter; and

(b) infiltrating a law firm representing the Times in litigation against the church, and thereby stealing confidential legal files relating to that litigation.

The federal statutes allegedly violated by those Scientologists accused of engaging in such activities include 18 U.S.C. §§371 (conspiracy to commit an offense or to defraud the United States), 1341 (frauds and swindles), and 1952 (interstate and foreign travel and transportation in aid of racketeering enterprises).

[2] The government apparently petitioned the district court for an order compelling Hermann to testify before the grand jury without invoking the fifth amendment privilege. *See* 18 U.S.C. §§ 6001 *et seq.* (1976). Section 6002 provides in part:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

. . . .

And the person presiding over the proceeding communicates to the witness an order issued under this part, the witness

(Footnote continued on following page)

order Hermann again refused to answer the questions propounded to him before the grand jury, this time alleging that the questions were the product of illegal electronic surveillance,[3] and moved pursuant to 18 U.S.C. § 3504[4] for

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(Footnote continued from preceding page)

> may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case. . . .

[3] Hermann was asserting his right under 18 U.S.C. § 2515 to have excluded any evidence derived from illegal interception of wire or oral communications. That statute provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any . . . proceeding in or before any . . . grand jury . . . of the United States, if the disclosure of that information would be in violation of this chapter.

[4] Section 3504 provides in pertinent part:

> (a) In any proceeding in or before any grand jury, of the United States—
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;
>
> • • • •

(Footnote continued on following page)

disclosure by the government of any electronic surveillance of him or his premises. In support of his motion, Hermann submitted both his own and his lawyer's statements disclosing their belief that their telephone conversations had been intercepted and documentation evidencing federal and Florida investigations of the Church of Scientology.

On June 16, 1980, the government filed its statutorily required response to Hermann's § 3504 motion. In it the government stated that the FBI had searched its records pertaining to electronic surveillance (to the extent the records had been indexed) and had not located anything indicating that Hermann or his lawyer had been monitored. Record searches by all potentially interested federal agencies[5] likewise disclosed no relevant evidence. The district court accepted the government's response as adequate under § 3504. Unfortunately, the life of the grand jury had expired before the district court reached the merits of the government's motion to hold Hermann in contempt.

(Footnote continued from preceding page)

> (b) As used in this section "unlawful act" means any act or use of any electronic, mechanical, or other device (as defined in Section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

This section provides the means for demonstrating illegal electronic surveillance and therefore for enforcing a witness' § 2515 rights.

[5] Those agencies included the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco and Firearms, United States Customs Service, United States Postal Service, the United States Secret Service, the Internal Revenue Service, the Central Intelligence Agency, the National Security Agncy, the Department of Defense, and the Immigration and Naturalization Service.

Appendix A

Consequently, the government subpoenaed Hermann to appear on June 10, 1981 before the federal grand jury which succeeded the grand jury before which Hermann had already appeared. Hermann again was offered immunity under 18 U.S.C. § 6002, but again he refused to testify, filing a § 3504 motion.[6] In support of this second § 3504 motion, Hermann submitted a letter in which the FBI admitted that it found two relevant "see" references in its La Vegas indices, both his own and his lawyer's affidavits indicating their belief that their conversations were being intercepted, and more documentation evidencing parallel state and federal investigations of the church. In response the government again denied any relevant electronic surveillance prior to June 16, 1980, but as to the

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[6] The questions which Hermann refused to answer were:

"Are you now or have you ever been a member of the Church of Scientology?"
"Are you now or have you ever been an employee of the Church of Scientology?"
"What positions of employment have you had with the Church of Scientology, particularly an organization referred to as the Guardian Office?"
"Directing your attention to approximately March of 1976, Mr. Hermann, did you direct Michael Meisner to plan a hit-and-run accident involving Mayor Gabe Cazares during the time in which he would be in Washington in attendance at a Mayor's Conference?"
"Do you have any information concerning the alleged hit-and-run accident that took place in March of 1976 concerning Gabriel Cazares?"
"Mr. Hermann what does 'FSM' mean to you?"
"How about 'Project Tacoless'?"
"Have you ever heard of Operation Speedy Gonzales?"
"Do you know Merill Vannier?"
"Do you know Francine Vannier?"
"Do you know Sharon Thomas?"

time period since then, the government swore only that it had checked with the FBI agent in Tampa supervising the investigation of the church who stated that no surveillance of Hermann had been conducted in the Middle District of Florida or, to his knowledge, anywhere else. The government did not deny that it had monitored Hermann's premises (Hermann lives outside Florida); nor did it respond at all to Hermann's claim that the government cooperated with the state of Florida in monitoring him. The sworn response did state that the questions sought to be asked were based solely upon information derived from interviews of other witnesses and from documents seized from the Church of Scientology, and denied that the questions were in any way derived from any electronic surveillance. Holding the government's response adequate, the district court adjudged Hermann in contempt.

On June 10, 1981 witness Francine Vannier also appeared under subpoena before the federal grand jury sitting in Tampa. She also asserted her fifth amendment privilege.[7] The government petitioned under 18 U.S.C.

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[7] The questions which Vannier refused to answer were:

"Mrs. Vannier, have you ever lived in Pinellas County, Florida?"

"Are you now or have you ever been a member of the Church of Scientology?"

"Are you now or have you ever been employed by the Church of Scientology?"

"Do you know an individual by the name of Gabriel Cazares?"

"Did you work in the congressional election campaign of Gabe Cazares?"

(Footnote continued on following page)

§§ 6001 *et seq.* for an order compelling her to testify under a grant of use immunity, and the district court so ordered. Like Mr. Hermann, however, Mrs. Vannier also persisted in her refusal to testify, claiming illegal surveillance by the government and a privilege against adverse spousal testimony. The premise of Mrs. Vannier's assertion of spousal privilege was her belief that her answers to the questions propounded would tend to incriminate her husband. In response to the district court's order to show cause why she should not be held in contempt, Mrs. Vannier joined with Mr. Hermann in moving under § 3504 for disclosure of illegal interception. Filing a single response to Hermann and Vannier's joint motion, the government simply referred to both movants generally in answering the motion. However, as this response covered only the time since the response to Hermann's first motion, the government submitted no denial of federal electronic surveillance of Vannier prior to June 16, 1980. In court the government acknowledged this defect in its response and assured the court that a supplemental affidavit would be submitted. Apparently relying on this, the district court ruled the response to Mrs. Vannier's motion adequate. The government, however, has not supplied a supplemental response. The court further ruled that the spousal privilege was inapplicable on the ground that the

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(Footnote continued from preceding page)

"If you worked in the election campaign of Gabe Cazares, were you doing so at the instructions of the Church of Scientology?"

"Were you sent to Pinellas County, Florida as an undercover operator for an FSM to work upon the campaign committee of Gabriel Cazares?"

answers to the questions would not incriminate her husband and held Mrs. Vannier in contempt.

These consolidated appeals present this court with two issues: (1) whether the government's response to the § 3504 motions is adequate, despite (a) no denial of electronic surveillance outside the Middle District of Florida since June 16, 1980; (b) no denial of electronic surveillance of appellants' premises; (c) no response at all to the claim that the subpoena and questions were the product of state and federal cooperation in an investigation of the church; and (d) in Vannier's case, no response at all concerning electronic surveillance prior to June 16, 1980; and (2) whether Vannier's allegation that her answers to these questions would tend to incriminate her husband constitutes just cause to refuse to testify?

With respect to Mr. Hermann, we hold that the government's response was adequate and affirm his contempt conviction. As to Mrs. Vannier, we conclude that she did not adequately raise a claim under § 3504 so as to require a government response. Furthermore, her claim of a privilege against adverse spousal testimony is meritorious with respect to only two of the questions which she refused to answer. With this modification, her contempt conviction is also affirmed.

I. Adequacy of the Government's Responses

A. Response to Hermann's Motion

Under 18 U.S.C. § 1826(a) the district court may confine a recalcitrant grand jury witness if the witness' refusal to testify is without "just cause." However, 18 U.S.C.

§ 2515 provides a defense to a contempt charge; a grand jury witness may decline to answer questions derived from illegal interception of the witness' communications. In short, a showing that the interrogation would be based upon the illegal interception of the witness' communications constitutes a showing of "just cause" that precludes a finding of contempt. *Gelbard* v. *United States,* 408 U.S. 41, 47-50 (1972).

Section 3504 provides a mechanism by which a potential witness may try to demonstrate that the questions posed were derived from illegal electronic surveillance. "[U]pon a claim . . . that evidence is inadmissible because it is the primary product of [illegal interception] . . ., the opponent of the claim shall affirm or deny the occurrence of the alleged" illegal surveillance. 18 U.S.C. § 3504 (1976). In this circuit the adequacy of the government's denial of illegal electronic surveillance is dependent upon the specificity of the witness' allegation of illegality. *In re Grand Jury Proceedings,* 643 F.2d 226, 229 (5th Cir. 1981); *United States* v. *Brummit,* 613 F.2d 62, 65 (5th Cir.), *cert. denied,* 447 U.S. 907 (1980); *United States* v. *Stevens,* 510 F.2d 1101, 1105 (5th Cir. 1975). Hermann does not argue, and indeed could not argue, that the government's response to his first § 3504 motion was inadequate. A record search by all potentially interested federal agencies which revealed no electronic surveillance of the movant or his attorney is a valid denial. In light of this prior all agency inquiry and response, we hold that the government's response to Hermann's second § 3504 motion was sufficient *as an update* of its first June 16, 1980 response. Were the government's second response the sole reply ever made to a claim by Hermann of illegal interception, we could not pronounce it sufficient.

That, however, is not the situation with which we are confronted. Here the government has already made a full inquiry in order to respond to Hermann's claims. Although we are cognizant of the importance of § 3504 as a means of enforcing a witness' right to decline to answer questions based on illegal interception and of the government's statutory burden to affirm or deny, we also are aware of the enormous potential inherent in a § 3504 motion for deliberate delay and hindrance of grand jury proceedings by a recalcitrant witness. As we observed in *United States* v. *Stevens*, 510 F.2d at 1105-06, "§ 3504 was never intended to permit a witness to thwart the progress of grand jury proceedings." In light of the government's prior response, requiring the goverment to respond more fully than it has to Hermann's second § 3504 motion would only enhance the utility of § 3504 as a weapon for frustrating legitimate grand jury investigations. Were we to impose such a requirement, a witness could request repeatedly a complete, full agency update, thus indefinitely postponing the investigation.[8]

Evaluating the government's second reply *as a supplemental response,* we conclude that it is a sufficient denial of illegal interception. In a sworn affidavit, a knowledgeable Assistant U.S. Attorney in charge of the grand jury investigation denied knowledge of any electronic surveillance of Hermann or his attorney outside the Middle District of Florida and denied categorically that any of the questions to be asked of Hermann was derived from il-

[8] Hermann's case illustrates well this obstructive potential. The life of the grand jury before which Hermann was first subpoenaed to appear expired during the course of the district court's hearing and disposition of Hermann's first § 3504 claim.

legal interception.[9] Viewed in the context of a prior denial of electronic surveillance based on an all agency record check, this reply is a sufficient denial of Hermann's claim of illegal electronic surveillance of him or his attorney and his premises.[10]

Hermann has also alleged that the government's failure to deny that the questions were the product of illegal electronic surveillance by cooperating state agencies justified his refusal to testify. We are not prepared to require the federal government to extend the scope of its inquiry and its required affirmance or denial to state agencies.[11] Moreover, the government's direct and unequivocal

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[9] We refuse to construe the government's response that it had "no knowledge" of surveillance outside the Middle District of Florida as a negative pregnant. The prior full agency inquiry and denial plus the categorical denial that any questions are the product of illegal surveillance suffice to remove the disingenuous import Hermann would have us assign to it.

[10] Again, we wish to emphasize that the failure to deny illegal electronic surveillance of a witness' premises would be fatal were this the government's initial response to a § 3504 motion.

As to the two "see" references to Hermann's name in the FBI's Las Vegas indices, the government has satisfied us that these references were the result of an inquiry from FBI headquarters to the Las Vegas office to determine if Mr. Hermann had been the subject of electronic surveillance and the Las Vegas office's response to that inquiry when the government was making the necessary record search to respond to Mr. Hermann's first § 3504 motion.

[11] We do not comment upon the federal government's obligation where it is shown that a federal agency exercised considerable dominion and control over a state agency's resources in pursuing a federal investigation. *See generally, In re Harris,* 383 F. Supp. 1036, 1039 (N.D. Cal. 1974). We do not find such circumstances present here.

denial that any of its questions were derived from any illegal surveillance—state or federal—is a sufficient answer to Hermann's claim. *In re Harris,* 383 F. Supp. 1036, 1039-40 (N.D. Cal. 1974).

B. Response to Vannier's Motion

As we observed above, the standard for determining the sufficiency of the government's denial of electronic surveillance varies with the degree of specificity of the allegations raised in a § 3504 motion to compel disclosure. *In re Grand Jury Proceedings,* 643 F.2d 226, 229 (5th Cir. 1981); *United States* v. *Brummit,* 613 F.2d 62, 65 (5th Cir.), *cert. denied,* 447 U.S. 907 (1980); *United States* v. *Stevens,* 510 F.2d 1101, 1105 (5th Cir. 1975). Furthermore, this court has stated that

> a "mere assertion" of unlawful surveillance is enough to trigger the government's obligation to affirm or deny. *However, such an "assertion" must be, at a minimum, a positive statement that unlawful surveillance has taken pace. A generalized motion based on the possibility of such surveillance . . . is not a "claim"* within the meaning of 18 U.S.C. § 3504(a)(1).

United States v. *Tucker,* 526 F.2d 279, 282 (5th Cir.), *cert. denied,* 425 U.S. 958 (1976) (emphasis added). In *Tucker* we held that the movants' allegation that "the Government *may* have conducted illegal electronic surveillance" of them or their attorneys was insufficient to state a §3504 claim and therefore required no response from the government. As in *Tucker,* we hold here that Mrs. Vannier has failed to state a "claim" of illegal electronic

surveillance and that the government, therefore, had no obligation to respond.

While *Tucker* implies that a general assertion warrants a general response, it also makes clear that such an assertion must be a *positive statement* of unlawful surveillance. The only "statement" made by Mrs. Vannier regarding surveillance was her refusal to answer each question asked of her on the ground that the question was "the product of unlawful surveillance." Such an oral objection during testimony is not tantamount to a "claim" for § 3504 purposes. Moreover, although Mrs. Vannier joined Mr. Hermann's motion to compel disclosure, that motion by itself does not contain any positive statement that Mrs. Vannier, her attorney, or her premises were the subject of unlawful surveillance. The motion contains only enumerated requests for disclosure. Mrs. Vannier did not submit, as did Mr. Hermann an affidavit containing positive assertions of illegal interception. Accordingly, we find entirely meritless Mrs. Vannier's request for reversal of her contempt conviction on the ground that the government's response to her suggestion of surveillance was inadequate.

II. Privilege Against Adverse Spousal Testimony

Mrs. Vannier relies upon the spousal privilege as an alternative ground for attacking her contempt conviction. She asserts that the scope of protection afforded by this privilege is coextensive with that of the fifth amendment to the United States Constitution. According to this equation, anything which might tend to incriminate the spouse may be deemed privileged, to the same degree as it would were the fifth amendment protection against self-incrimination applicable. However, Mrs. Vannier fails to offer

any persuasive precedent or policy reasons in favor of such a rigorous standard; nor, it seems, does such support exist. To the contrary, at least one case has suggested that these two privileges are indeed *not* of the same magnitude or scope:

> The privilege has not ordinarily been construed to allow one spouse to decline to testify merely because the testimony may incrimate [sic] the other. Wigmore, *supra* at 231, n.2.

United States v. *Snoonian,* 502 F.2d 110, 112 (1st Cir. 1974).

Invocation of any privilege obviously works to exclude from the jury's or the court's consideration what otherwise might be admissible evidence:

> Privileges are impediments to the search for truth, finding their justification in the priority of societal values they serve. The higher-than true value served by the [spousal] privilege . . . is the protection of the marital bond.

United States v. *Brown,* 605 F.2d 389, 396 (8th Cir. 1979).

The different purposes and social values fostered by the privilege against self-incrimination and the spousal privilege support a distinction in the scope of protection afforded each. While the privilege against self-incrimination, guaranteed by the Constitution in the Bill of Rights, is virtually an absolute, the spousal privilege clearly is not:

> The scope of the marital privilege has never been construed, even at common law, as absolute. *Wigmore, supra.* And as it is in derogation of the pu-

> lic's "right to every man's evidence", *United States* v. *Bryan*, 339 U.S. 323, 331, 70 S. Ct. 724, 94 L.Ed. 884 (1950), it is not to be "expansively construed."

United States v. *Snoonian*, 502 F.2d at 112-113:

> Applicability of the marital privilege is determined on a case by case basis, after a careful balancing of the public's need for disclosure on the one hand against the need to protect the marital relationship on the other.[12] The disfavor into which the marital privilege has fallen, largely because of rejection of the archaic notice of the unity of husband and wife, is in stark contrast to to the unwavering, constitutionally-protected right of the individual against self-incrimination. Wigmore offers a further reason for the limitation of the spousal privilege:
>
> > [T]he exclusion of a wife on the ground that her testimony may reveal his misconduct, and thus "tend" to charge him, rests on the assumption, false to fact, that her testimony on the stand would in any sense be a revelation, an unsealing of that which was secret. Nothing prevents her from revealing her knowledge out of court; in most instances she has in fact done so. It would be mere hypocrisy to sanction her silence on the stand on the pretext that her husband was thus really safeguarded from her disclosure.

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[12] According to Rule 501 of the Federal Rules of Evidence,

> [e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

8 Wigmore on Evidence § 2234 at 231-232 (McNaughton rev. 1961).

On the basis of the above, we reject Mrs. Vannier's assertion that the marital privilege is coextensive with the constitutional privilege against self-incrimination, and adopt, instead, its narrow application here. It does not appear to the court that the Vanniers' marriage could be jeopardized or that Mr. Vannier's guilt could be indicated in any way by Mrs. Vannier's answering objective questions containing no reference to her husband. Questions as to whether she resided in Pinellas County; whether she is a member of the Church of Scientology; whether she was ever employed by the Church; and whether she knows Cazares or worked in his election campaign, appear entirely innocuous, neither calculated to, nor capable of incriminating her husband.

The court concedes that answers to the last two questions[13] regarding whether Mrs. Vannier worked in the Cazares campaign at the instruction of the Church of Scientology and whether she was sent to Pinellas County as an undercover operator to work on Cazares' campaign committee might reflect negatively on her husband's innocence. For that reason, we hereby strike Mrs. Vannier's contempt conviction as to those latter questions only, on the grounds of spousal privilege. In doing so, the court rejects a sweeping application of the privilege to the five preceding questions. In *United States* v. *Brown*, 605 F.2d 389 (8th Cir. 1979), the court reached the same conclusion when it refused to apply the marital privilege to objective questioning:

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[13] See the list of seven questions asked of Mrs. Vannier in note *7 supra*.

Appendix A

> Mrs. Clincy's testimony concerning events prior to her marriage was limited to her meeting Clincy and her forming and operating Knox Enterprises with him for a short time prior to May 16, 1978. *Nothing in that testimony reflected illegal activity of any kind on the part of anyone.* The sole testimony of Mrs. Clincy about events after her May 16th marriage to Clincy, and touching Clincy in any way was her statement that he left her within two weeks after the marriage and that she had not seen him since. Her entire remaining testimony about events after her marriage concerned only herself, *i.e.*, statements that signatures on various checks were not her signature.
>
> Clincy was totally unharmed by his wife's testimony. We conclude, moreover, that the marital privilege itself went unscathed in this case. The privilege is not absolute.

605 F.2d at 396 (emphasis added).

Similarly, in *United States* v. *George,* 444 F.2d 310 (6th Cir. 1977), a husband's claim of marital privilege was rejected where his spouse was not the focus of the investigation and where the question "did not relate to his wife nor to any communication with her." 444 F.2d at 314. Although Mr. Vannier clearly is a target here, thus creating a distinction between the present situation and that in *George,* nevertheless the objective nature of the questions was a significant and persuasive factor in the *George* decision, as the court recognizes it to be in the present case.

For the foregoing reasons, the court affirms Mrs. Vannier's civil contempt conviction, except as to her failure to respond to the last two questions asked of her at the grand jury hearing.

Appendix A

No. 81-5602 IN RE: GRAND JURY PROCEEDINGS, MITCHELL HERMANN, Witness, Appellant;

81-5636 IN RE: GRAND JURY PROCEEDINGS, FRANCINE VANNIER, Appellant.

HILL, Circuit Judge, CONCURRING in part and DISSENTING in part:

I concur fully in the affirmance of the contempt conviction of Mr. Hermann on the ground of the adequacy of the government's response to his claim of illegal surveillance. I would reverse, however, Mrs. Vannier's conviction and uphold her claim of a privilege against adverse spousal testimony.

My disagreement centers on the court's analysis of the privilege against adverse spousal testimony. The majority fails to appreciate the peculiar effect that the probable conspiracy indictment has upon any invocation of that privilege. It is under the peculiar circumstances of a conspiracy involving both husband and wife that I would agree with appellant Vannier that the privileges against adverse spousal testimony and against self-incrimination are coextensive.

Subject to sharp criticism for its basis in outdated notions which regarded the woman as a chattel and denied her a separate legal existence, the privilege against adverse spousal testimony has had a checkered history.[1] Recently the United States Supreme Court modified the privilege "so that the witness spouse alone has a privilege

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[1] *See generally Trammel* v. *United States*, 445 U.S. 40, 43-50 (1980).

to refuse to testify adversely" and "may be neither compelled to nor foreclosed from testifying." *Trammel* v. *United States,* 445 U.S. 40, 53 (1980). *See also* Fed. R. Evid. 501 (applicable to grand juries under Fed. R. Evid. 1101(d)). As an unwilling witness, Mrs. Vannier may not be compelled to testify if in fact the testimony would be adverse to her husband's interest. Thus the issue becomes whether Mrs. Vannier's answers to the questions posed[2] would tend to incriminate her husband.

In *Blau* v. *United States,* 340 U.S. 159 (1950), a case involving the fifth amendment privilege against self-incrimination, the Supreme Court noted that the danger of incrimination must not be viewed narrowly. Such a danger may exist, said the Court, even if the answer to a question would not by itself support a conviction. It suffices if the "[a]nswers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of the petitioner." *Id.* at 161. In *Hoffman* v. *United States,* 341 U.S. 479 (1951), the Supreme Court further elaborated on the standard governing incriminating statements:

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. . . . To sustain the privilege, it need only be evident from the implications of the question, *in the setting in which it is asked,* that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

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[2] *See* note 7 *supra.*

Id. at 486 (citations omitted) (emphasis added). Therefore a claim of incrimination must be upheld unless it is perfectly clear that the answers to the questions could not possibly incriminate. *Id.* at 488. The setting in which the questions here were asked—a grand jury investigation of, *inter alia,* a conspiracy charge[3] involving Vannier's husband—becomes crucial to a proper resolution of a claim of privilege against self-incrimination and against adverse spousal testimony.

The government does not dispute that Mrs. Vannier's husband, Merrill Vannier, is one of the subjects or targets of the federal grand jury's investigation. Allegations concerning Mr. Vannier include claims that he is a member of the Church of Scientology who participated in the unlawful campaign to harass, discredit and silence organizations critical of the church. More specifically, the government believes that Merrill Vannier was the attorney who, as an undercover operative for the church, sought to and did represent Gabriel Cazares in his litigation with the church and breached the attorney-client relationship with Cazares by disclosing confidential communications to the church and its attorneys. Along with witnesses Hermann and Mrs. Vannier, Mr. Vannier was subpoenaed to appear before the federal grand jury in the Middle District of Florida on June 10, 1981. Mr. Vannier asserted his fifth amendment privilege against self-

[3] See note 1 *supra.*

incrimination in response to the questions posed to him.[4] Significantly, the government did not offer Mr. Vannier use immunity in order to compel his testimony. This omission reinforces any suspicion that the government plans to indict Mr. Vannier.

With this setting in mind, it becomes clear that the questions posed to Mrs. Vannier were not "innocuous," as the government contends and the majority agrees, but contain potential for providing a link in a chain of evidence which might be used to convict Mr. Vannier.

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[4] These questions included the following:

"Are you now or have you ever been a member of the Church of Scientology?"

"Have you ever held an office in the Church of Scientology?"

"In fall 1975, 1976, and 1977 did you ever reside in Pinellas County?"

"Have you ever attended or graduated from any law school in the United States?"

"What state bars are you a member of? Aren't you a member of the Florida Bar?"

"In 1975, when you flew to Florida, did you come with your wife?"

"Do you know Gabriel Cazares?"

"Did you ever have an attorney-client relationship with Gabe Cazares?"

"Were you ever employed in Pinellas or Hillsborough Counties as an attorney?"

"Did you ever obtain or seek a job with James Russell of the State Attorney's Office?"

"Do you know Mitch Hermann?"

Appendix A

Under the law of conspiracy, the acts of one co-conspirator in furtherance of the unlawful agreement are admissible against all, even in the absence of the other's approval of these overt acts. *United States* v. *Netterville,* 553 F. 2d 903, 912 (5th Cir. 1977), *cert. denied,* 434 U.S. 1009 (1978). The overt act itself need not be criminal if it is in furtherance of the unlawful agreement, *United States* v. *Enstam,* 622 F.2d 857, 867 (5th Cir. 1980), and it may occur before or after the others join the conspiracy. *United States* v. *Netterville,* 573 F.2d at 912. If, for example, Mrs. Vannier were to testify that she moved from California to Pinellas County, Florida with her husband in 1975, and the government proves that the purpose of the move was to engage in, as a field service member of the Church of Scientology, any of the alleged unlawful activities recited in footnote 1, this overt act would provide evidence admissable against Mr. Vannier as an alleged co-conspirator. Likewise, an affirmative answer by Mrs. Vannier that she infiltrated the election campaign of Gabriel Cazares would prove an act attributable to Mr. Vannier. This brief discussion suffices to show that, given the scope of the grand jury's investigation into activities of members and employees of the Church of Scientology, it is not perfectly clear that the answers to the questions could not possibly incriminate Mr. Vannier. *United States* v. *Hoffman,* 341 U.S. at 488.

This possibility of incrimination, which arises by virtue of the fact that a conspiracy is at issue, convinces me that Mrs. Vannier's claim of privilege should be upheld. The majority apparently concedes that Mr. Vannier's guilt might be indicated and the Vannier marriage jeopardized by Mrs. Vannier's answers to at least two of the questions. This is sufficient to persuade the court to uphold

the privilege as to these questions. But the other apparently lawful acts which were the subject of the other "objective" questions can also incriminate when performed in the context of a conspiracy, an unlawful agreement to accomplish lawful objectives by unlawful means or to accomplish unlawful objectives. For this reason, I view it imperative that the privilege against adverse spousal testimony be honored where the government seeks to indict one spouse for a conspiracy involving both and attempts to procure that indictment through incriminatory testimony of the remaining spouse.

APPENDIX B

Order of the United States District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

No. 81-1

IN RE: GRAND JURY PROCEEDINGS
FRANCINE VANNIER

ORDER

Grand Jury proceedings concerning Mrs. Vannier were conducted on June 17, 1981, along with proceedings concerning Mitchell Hermann. The proceedings were, with the consent of all the parties, conducted concurrently with one record being made. Separate orders will be entered as to each.

Mrs. Vannier was granted use immunity under Title 18, Section 6001 et seq., United States Code on June 10, 1981. Thereafter, upon a motion of the government an order was entered directing her to show cause on June 17 why she should not be punished for contempt, or as a recalcitrant witness under the provisions of Title 28, Section 1826, United States Code.

At hearing on June 17, she appeared with counsel. The Court announced that she would be given an "uninhibited adversary hearing."

Her counsel filed a renewed motion for hearing on his claim that Grand Jury 81-1 was biased against her and the Church of Scientology as a result of prejudicial publicity, filing a supplemental memoranda in support thereof, together with the affidavit of a Mr. Jay Schulman and a suggestion that a record of related proceedings be incorporated for the purpose of that hearing. The Court considered the affidavit and memoranda, granted the motion for incorporation of record and denied the claim of prejudicial publicity.

Counsel then filed a motion for disclosure of electronic surveillance. That motion was, in effect, granted when Court received and considered an affidavit of Terrance A. Bostic, an Assistant United States Attorney, and upon consideration of the motion, the memoranda in support thereof, the affidavit of Mr. Bostic, the affidavit of Mitchell Hermann, and the affidavits and other matters attached to the motion, the Court was and is satisfied that requirements of *Gelbard* v. *United States,* 408 U.S. 41 (1972) and Title 18, Section 3504(a), United States Code had been made and that there was no showing of a violation or potential violation of the fourth amendment or any law in connection with the questions propounded by the Grand Jury.

Counsel then filed and relied upon a memoranda in opposition to a finding of contempt which raised again matters that had previously been presented to the Court at the time of the hearing for the grant of use immunity. Upon consideration, relief claimed therein was denied and the opposition overruled.

Finally, counsel for Mrs. Vannier urged that Mrs. Vannier was legally entitled to decline to answer questions on the basis of the privilege against adverse spousal testimony, urging the case of *Trammel* v. *United States,* 445 U.S. 40 (1980) and appeal of *Malfitano,* 633 F.2d 276 (3d Cir. 1980).

The government produced the transcript of the questions propounded to Mrs. Vannier before Grand Jury 81-1 with her response and by stipulation the transcript was received in evidence and made a part of the record. Counsel for Mrs. Vannier filed a memorandum on the question of spousal privilege attached to which is an affidavit of counsel. Upon consideration of the motion, the memoranda and cases cited therein, the transcript of the questions propounded to Mrs. Vannier and argument of counsel, the Court was and is of the opinion that none of the questions propounded called for answers which would or might tend to incriminate Merrill Vannier, the husband of Francine Vannier. Therefore, I found that the adverse spousal privilege provides no valid reason why Mrs. Vannier should not answer said questions. Her counsel then announced that there were no further matters to be heard in opposition to proceedings with the Court's inquiry of Mrs. Vannier.

The Court inquired of Mrs. Vannier whether or not she would, if given the opportunity, answer the questions propounded by the Grand Jury; she said that she would not and did not intend to, whereupon I found and adjudged Mrs. Vannier to be in civil contempt of this Court and of Grand Jury 81-1, and pursuant to Section 1826(a), Title 28, United States Code she was committed to the custody of the Attorney General or his authorized representatives, to be confined at a suitable place until such

time as said Francine Vannier was, or is willing to give testimony to and before Grand Jury 81-1 of this Court, provided that no such period of confinement shall exceed the life of the term of said Grand Jury, including extentions, or eighteen (18) months after the date of such confinement, whichever first occurs.

Upon such ruling, respondent Vannier indicated an intention to appeal under the provisions of Section 1826(b), Title 28, United States Code and moved that appeal bond be fixed and that conditions be set for release on bail.

After hearing, the Court found that an appeal by Mrs. Vannier of the Court's ruling would not be frivolous and that release on bail pending appeal should be allowed. Upon consideration, execution of the order of confinement contained herein is deferred until 12 o'clock noon, Friday, June 19, 1981, unless prior to said time the respondent, Mrs. Vannier, files a notice of appeal together with a $1,000 personal recognizant appeal bond in the usual form with said bond to be secured by a 10% cash deposit, in which event execution is deferred pending appeal and subject to the results thereof.

IT WAS AND IS SO ORDERED at Tampa, Florida this 18th day of June, 1981.

BEN KRENTZMAN
United States District Judge

Opposition

Office - Supreme Court, U.S.
FILED
FEB 16 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1071 and 81-1108

In the Supreme Court of the United States

OCTOBER TERM, 1981

FRANCINE VANNIER, PETITIONER

v.

UNITED STATES OF AMERICA

MITCHELL HERMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, following an allegation by a grand jury witness that questions asked during the investigation were the result of illegal electronic surveillance, the government's response was adequate under 18 U.S.C. 3504.

2. Whether, in a conspiracy investigation, the privilege against adverse spousal testimony permits an immunized grand jury witness to refuse to respond to any questions the answers to which might, in combination with other information, tend to be self-incriminating, where the witness's spouse is also suspected by the government of being a member of the conspiracy and where the questions appear neither calculated to incriminate, nor capable of incriminating, the nonwitness spouse.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a)[1] is reported at 664 F.2d 423.

[1] "Pet. App." refers to the appendix to the petition in No. 81-1071.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1981. The petition in No. 81-1071 was filed on December 9, 1981. The petition in No. 81-1108 was filed on December 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were held in civil contempt by the United States District Court for the Middle District of Florida for refusing to answer questions during a federal grand jury proceeding. In No. 81-1071, the court of appeals affirmed the contempt order as to five of the seven questions asked the petitioner (Pet. App. 9a, 18a). In No. 81-1108, the court of appeals affirmed the contempt order (*id.* at 9a).

1. The pertinent facts are set forth in the opinion of the court below (Pet. App. 2a-9a). During June 1981 petitioners, as well as Merrill Vannier, husband of petitioner Vannier, were subpoenaed to appear before a grand jury of the Middle District of Florida investigating allegations that members and employees of the Church of Scientology had planned and implemented actions to harass and discredit critics of the church in central Florida, including Gabriel Cazares, a candidate for Congress, in violation of 18 U.S.C. 1341, 1952, and 371 (*id.* at 2a & n.1, 21a). Among the possible offenses by various individuals under investigation were allegations that petitioner Vannier's husband, while acting as Cazares' attorney in civil litigation, disclosed confidential communications in order to discredit him, that Vannier came to Florida in 1975 as an undercover operator for the Church of Scientology, and that, while there, she worked in the Cazares election campaign and induced Cazares

to retain her husband as his attorney (*id.* at 2a n.1, 21a).

a. In February 1980 petitioner Hermann, an alleged participant in the scheme to discredit Cazares, was subpoenaed to testify before a predecessor grand jury investigating the same allegations. Relying upon 18 U.S.C. 2515,[2] which permits a grand jury witness to decline to answer questions derived from illegal interception of the witness's communications, he refused to answer questions propounded to him before the grand jury and moved, pursuant to 18 U.S.C. 3504,[3] for disclosure by the government of any electronic surveillance of him or his premises. To support the disclosure motion, both Hermann and his attorney submitted statements asserting their belief that their telephone conversations had been intercepted, as well as documentation evidencing both

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[2] 18 U.S.C. 2515 provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

[3] 18 U.S.C. 3504 provides in pertinent part:

> (a) In any * * * proceeding * * * before any * * * grand jury * * * of the United States—
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act * * *.

federal and state investigations of the Church of Scientology (Pet. App. 2a-5a).

On June 16, 1980, the government filed a response to the motion stating that the FBI had searched its electronic surveillance records and had failed to locate anything indicating that Hermann or his attorney had been monitored, and that searches by other potentially interested federal agencies likewise disclosed no evidence of surveillance. Although the trial court accepted this response as adequate under 18 U.S.C. 3504, the life of the grand jury terminated before it could reach the merits of the government's motion to hold Hermann in contempt (Pet. App. 5a).

When, during the June 1981 grand jury proceeding, Hermann was summoned to appear, he again refused to testify on the ground that the questions asked were based upon unlawful electronic surveillance. Principal submissions in support of this claim were a letter in which the FBI stated that it had found two "see" references pertaining to his name in its Las Vegas field office files and documentation that he alleged demonstrated that federal authorities had cooperated with state authorities investigating the Scientologists (Pet. App. 6a). The government's sworn affidavit in response, dated June 17, 1981, included a denial that it had conducted any relevant surveillance during the period embraced by its preceding June 1980 response. With respect to the period since that response, it asserted that the FBI agent in Tampa supervising the investigation had stated that no surveillance of Hermann had been conducted in the Middle District of Florida. Although the affidavit contained no express denial that government agents had not monitored Hermann's premises outside the Middle District of Florida, it stated that neither the affiant nor the supervising agent had

knowledge of any electronic surveillance anywhere else (*id.* at 6a-7a). Finally, the government averred that the questions sought to be asked were not in any way derived from any electronic surveillance (*id.* at 7a).

Ruling that it was "satisfied * * * that there was no showing of a violation or potential violation of the Fourth Amendment or any law in connection with the questions propounded by the Grand Jury" (Pet. App. 26a), the district court adjudged Hermann in contempt (*id.* at 5a).

b. During the 1981 grand jury investigation, petitioner Vannier, who had received use immunity so as to preclude self-incrimination, was asked the following questions before the grand jury (Pet. App. 7a-8a & n.7):

> Mrs. Vannier, have you ever lived in Pinellas County, Florida?
>
> Are you now or have you ever been a member of the Church of Scientology?
>
> Are you now or have you ever been employed by the Church of Scientology?
>
> Do you know an individual by the name of Gabriel Cazares?
>
> Did you work in the Congressional election campaign of Gabe Cazares?
>
> If you worked in the election campaign of Gabe Cazares, were you doing so at the instructions of the Church of Scientology?
>
> Were you sent to Pinellas County, Florida as an undercover operator for an FSM to work upon the campaign committee of Gabriel Cazares?

Vannier declined to testify on the ground that her answers would tend to incriminate her husband (*id.* at 8a). The district court ruled "that none of the questions propounded called for answers which would

or might tend to incriminate Merrill Vannier, the husband of [petitioner] Vannier" (Pet. App. 27a). He accordingly adjudged her in civil contempt and committed her to the custody of the Attorney General until she agreed to testify or until expiration of the term of the grand jury (*id.* at 27a-28a).

2. On appeal, Hermann claimed that the government's June 1981 response to his allegation of unlawful electronic surveillance was inadequate because it failed to contain a denial of electronic surveillance of his premises outside the Middle District of Florida, to respond to the claim that the federal government had cooperated with state officials in investigating the Scientologists, or to explain the "see" references in what Hermann described as the electronic surveillance files of the FBI Las Vegas field office. In its response (Gov't Br. 21) the government noted that Hermann had mischaracterized the letter (which he had received in response to a Freedom of Information Act request), since it merely reported finding two "see" references after "review of the Las Vegas division central indices and ELSUR indices." In a footnote (Gov't Br. 22 n.15), the government advised the court that in response to a July 4, 1981, inquiry to the Las Vegas office, it was learned that the "see" references were, in fact, contained in the office's central indices and consisted merely of the FBI headquarters' original inquiry whether Hermann had been subjected to electronic surveillance and the field office's response that he had not.

The court of appeals rejected each of Herman's contentions (Pet. App. 9a-13a). It held that, although the government's response to Hermann's Section 3504 motion during the 1981 grand jury proceeding was not independently sufficient to meet the requirements of 18 U.S.C. 3504, when considered as an update of

the government's response to his earlier motion, it constituted "a sufficient denial of illegal interception" (Pet. App. 11a). The court also noted that the government had adequately explained the reason for the "see" reference in the Las Vegas FBI files (*id.* at 12a n.10). Finally, addressing the claim that federal authorities had cooperated with the state investigation of the Scientologists, the court stated that it was not prepared, on the limited showing made by petitioner Hermann, to require the federal government to extend its affirmance or denial to state agencies (*id.* at 12a n.11) and that, in any event, "the government's direct and unequivocal denial that any of its questions were derived from any illegal surveillance—state or federal—is a sufficient answer to Hermann's claim" (*id.* at 12a-13a).

Vannier argued that the spousal privilege entitled her to refuse to respond to the questions asked during the grand jury proceedings because the answers to the questions would tend to incriminate her husband. In rejecting this contention, as to five of the questions the court held (*id.* at 17a):

> It does not appear to the court that the Vanniers' marriage could be jeopardized or that Mr. Vannier's guilt could be indicated in any way by Mrs. Vannier's answering objective questions containing no reference to her husband. Questions as to whether she resided in Pinellas County; whether she is a member of the Church of Scientology; whether she was ever employed by the Church; and whether she knows Cazares or worked in his election campaign, appear entirely innocuous, neither calculated to, nor capable of incriminating her husband.

The court determined, however, that the last two questions asked Vannier, regarding whether she

worked in the Cazares campaign at the instruction of the Church of Scientology and whether she was sent to Florida as an undercover operative to work on Cazares' campaign committee, might reflect negatively on her husband's innocence. For that reason, it reversed, on the ground of spousal privilege, the district court's determination that she was obliged to answer those questions (*ibid.*).

Judge Hill voted to affirm Hermann's contempt conviction but dissented with respect to the court's affirmance of the district court's order holding Vannier in contempt for refusal to answer the five questions (Pet. App. 19a-24a). By analogy to the scope of the Fifth Amendment right against compelled self-incrimination, he reasoned that the spousal privilege properly could be asserted as to any question if the " '[a]nswers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of the petitioner.' " Pet. App. 20a, quoting *Blau* v. *United States*, 340 U.S. 159, 161 (1950). He therefore concluded that assertion of the spousal privilege should be upheld because in his view it was not "perfectly clear that the answers to the questions could not possibly incriminate" Vannier's spouse (*id.* at 23a).

ARGUMENT

1. Petitioner Hermann contends (81-1108 Pet. 10-22) that the government's response to his allegation that questions asked during the 1981 grand jury proceeding were based upon illegal electronic interceptions failed to fulfill the requirements of 18 U.S.C. 3504, and that, as a result, he lawfully refused to respond to the questions. This claim was properly rejected by the court below, and further review is unwarranted.

a. Hermann first argues (81-1108 Pet. 11-14) that the government's explanation for the presence of the "see" references in indices of the Las Vegas FBI field office was insufficient because it was not contained in an affidavit, was supplied for the first time on appeal, and contained hearsay material. None of these alleged infirmities required the court below to ignore the explanation, however, and because of the circumstances in which it was given, the issue petitioner attempts to make of it is of little significance beyond the present case.

The unsworn material contained in the government's brief was not a submission under Section 3504 "affirm[ing] or deny[ing] the occurrence of the alleged unlawful [surveillance]." As explained above (page 6, *supra*), it was offered in connection with a response to a misleading characterization in Hermann's brief respecting the letter he had received from the FBI in response to his Freedom of Information Act request. The denials on which the court of appeals relied as an adequate supplement to the government's comprehensive response to Hermann's first Section 3504 motion (Pet. App. 11a-12a) were contained in the prosecutor's sworn affidavit.[4] While it would have been preferable to have identified the spokesman in the FBI Las Vegas office and to have

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[4] We note, however, that even as to affirmances and denials within the meaning of Section 3504, the statute does not require an affidavit. Although the Seventh Circuit has imposed such a requirement in the exercise of its supervisory power (*Korman* v. *United States*, 486 F.2d 926, 931 (1973)), other courts have accepted unsworn declarations from government officers. See, *e.g.*, *United States* v. *Williams*, 580 F.2d 578, 585 n.38 (D.C. Cir.), cert. denied, 439 U.S. 832 (1978); *United States* v. *D'Andrea*, 495 F.2d 1170, 1174 n.12 (3d Cir. 1974).

clarified the point in the district court, we note that government declarations pertaining to Section 3504 issues have, in some cases, been accepted at the appellate stage of contempt proceedings. See, *e.g.*, *Matter of Grand Jury Proceedings* (*Antill*), 579 F.2d 1135, 1136 (9th Cir. 1978); *In re Buscaglia*, 518 F.2d 77, 79 (2d Cir. 1975). Given the nature and special circumstances of the statement concerned here, no issue warranting review by this Court is presented.

b. Hermann also contends (81-1108 Pet. 19-21) that the court below erred in holding that it was unnecessary for the government's denial of unlawful electronic surveillance to embrace possible surveillance by state agencies, at least when the prosecutor had unequivocally denied that the proposed questions were the product of either state or federal electronic surveillance and where there was no showing that the federal agency exercised dominion and control over a state agency's investigative resources.

Hermann cites no published federal appellate authority supporting a broad rule that a federal prosecutor must have a search made of state agency records whenever there is a "credible connection" of any kind between a state agency and a federal investigation, and even the authorities he does cite are more limited than he suggests. Thus in *Santangelo* v. *People*, 49 A.D.2d 220, 374 N.Y.S.2d 107 (1975), appeal dismissed, 38 N.Y.2d 536, 344 N.E.2d 404, 381 N.Y.S.2d 472 (1976), the court simply held (49 A.D.2d at 223, 374 N.Y.S.2d at 110), pursuant to state law, that when a state grand jury investigation had been "federally induced and federally developed," the state prosecutor should make an inquiry concerning federal electronic surveillance of the grand jury target. In *In re Harris*, 383 F. Supp. 1036, 1039 (N.D. Cal. 1974), the district court merely noted, in rejecting a federal grand jury

contemnor's contention that a ~~clerk~~ check of state records was necessary, that the contemnor "ha[d] failed to make any credible connection between [a state law enforcement agency] and the Special Grand Jury investigation in this matter." Given the federal prosecutor's explicit denial that the questions that Hermann refused to answer were derived from any illegal state surveillance, Hermann's proffer of evidence of limited federal-state contacts is insufficient to require the federal prosecutor to undertake a survey of state agency records.

c. Finally, the court below properly rejected Hermann's contention (81-1108 Pet. 21-23) that the prosecutor's June 17, 1981, affidavit denying electronic surveillance was inadequate because it did not affirmatively state that there had been no unlawful electronic surveillance of his premises outside the Middle District of Florida.

"The specificity of the prosecution's denial and the comprehensiveness of the search on which the denial is predicated must be measured against the specificity of the allegations of unlawful electronic surveillance and the strength of the support for those allegations." *United States* v. *Gardner*, 611 F.2d 770, 774 (9th Cir. 1980). Accord *United States* v. *Yanagita*, 552 F.2d 940, 944 (2d Cir. 1977). Moreover, where the surveillance claim is made as a basis for refusing to answer particular questions, only surveillance efforts known to those responsible for conducting the investigation and formulating the questions are relevant. *United States* v. *Yanagita*, *supra*, 552 F.2d at 944. Here the "new information" submitted in support of Hermann's refusal during the second grand jury investigation to answer the prosecutor's questions consisted principally of the "see" references in the Las Vegas FBI

central indices, evidence of an investigation of the Scientologists by a state prosecutor in counties near the Tampa area, and evidence of contacts between that state prosecutor and the United States Attorney for the Middle District of Florida (81-1108 Pet. 6). The federal prosecutor's affidavit stated not only that the FBI agent in charge of the investigation averred that there had been no FBI surveillance in the Middle District of Florida since the period covered by the government's original comprehensive denial, but that the questions which the prosecutor sought to propound to Hermann were based solely upon documents seized from the Church of Scientology and interviews with other witnesses and "were in no way derived from any electronic surveillance" (Gov't Brf. App. A-14). In the circumstances of this case, that affidavit provided a sufficient basis for requiring Hermann to answer the questions.

2. Petitioner Vannier contends (Pet. 9-14) that the court of appeals erred in holding that the privilege against adverse spousal testimony permitted her to refuse to answer only two questions the answers to which "might reflect negatively on her husband's innocence" and did not extend to five other questions that "appear entirely innocuous, neither calculated to, nor capable of incriminating her husband" (Pet. App. 17a).[5] She asserts that where

[5] Although the court of appeals noted (Pet. App. 17a) that it could see no harm in "objective questions containing no reference to [Vannier's] husband," it is clear, contrary to petitioner Vannier (Pet. 9), that the court did not apply a mechanical test which would permit any questions containing no literal reference to a witness's spouse. The two questions that the court of appeals held within the privilege did not, on their face, refer to Vannier's husband (Pet. App. 7a n.7, 17a).

spouses are alleged to be members of a conspiracy, an immunized witness spouse may decline to give any testimony that might, either alone or in combination with other information, be *self*-incriminating. We are aware of no authority that would support such a sweeping rule, which would bar virtually any testimony by an individual who participated in a conspiracy that could possibly have included his or her spouse and thus confer on all the other conspirators the fruits of the spousal privilege.[6] Indeed, although the issue was not decided below and is not raised here, it is noteworthy that some authorities suggest that the rule is exactly to the contrary—*i.e.*, that when the spouses are co-conspirators the spousal privilege does not apply at all.[7]

The spousal, or marital, privilege, like other common law privileges, is in derogation of the public's " 'right to every man's evidence' " and thus must be "strictly construed." *Trammel* v. *United States*, 445 U.S. 40, 50 (1980), quoting *United States* v. *Bryan*,

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[6] Even the dissenting judge, despite remarks supporting petitioner's proposed rule, found it necessary to explain why, in his view, petitioner's answers to the five questions might prove her husband's guilt—a fact-bound matter on which the panel majority differed. We note also that in discussing the questions, the dissenting judge has inaccurately paraphrased them. He describes the question whether petitioner had "work[ed]" in the Cazares campaign as a question whether she had "infiltrated" it, and he characterizes the question concerning her residence in Pinellas County as a question whether she had moved there with her husband (Pet. App. 23a).

[7] See, *e.g.*, *United States* v. *Van Drunen*, 501 F.2d 1393 (7th Cir.), cert. denied, 419 U.S. 1091 (1974); *United States* v. *Trammel*, 583 F.2d 1166, 1168-1170 (10th Cir. 1978), aff'd on other grounds, 445 U.S. 40 (1980). Contra, *Appeal of Malfitano*, 633 F.2d 276, 278-279 (3d Cir. 1980).

339 U.S. 323, 331 (1950). The observation of the court below (Pet. App. 16a) that "[a]pplicability of the marital privilege is determined on a case by case basis, after a careful balancing of the public's need for disclosure on the one hand against the need to protect the marital relationship on the other" is consistent with the approach generally taken by the courts, which consider the degree to which each particular question might incriminate the witness's spouse. See, *e.g.*, *United States* v. *Brown*, 605 F.2d 389, 396 (8th Cir.), cert. denied, 444 U.S. 972 (1979); *United States* v. *George*, 444 F.2d 310, 314 (6th Cir. 1971); *United States* v. *Weinberg*, 439 F.2d 743, 750 (9th Cir. 1971). See also *Appeal of Malfitano*, 633 F.2d 276 (3d Cir. 1980).

No case embraces the rule urged by petitioner, and *United States* v. *Weinberg*, *supra*, is directly to the contrary. The witness claiming the spousal privilege in that case was an immunized alleged participant in a conspiracy to violate various laws involving interstate transportation of firearms and explosives and interstate travel to promote riots. 439 F.2d at 744-745, 750. The court indicated that she might properly have refused to answer questions concerning the identity of those present during riots in which she had participated and on occasions when explosives or firearms were present; but it noted that the questions "could be reframed in such manner as not to require [her] to disclose whether or not her husband was present or participated." 439 F.2d at 750 n.10. If such "reframed" questions would not give rise to a claim of privilege, the innocuous questions here concerning petitioner's activities—which did not directly implicate even *her* in any crime—are, *a fortiori*, not a proper basis for invoking the privilege.

Petitioner errs in suggesting that *Appeal of Malfitano, supra*, and *Hawkins* v. *United States*, 358 U.S. 74 (1958), conflict with the decision below. In *Malfitano* the court considered whether, in the context of the particular facts of that case, the questions asked of the appellant would implicate her husband. It reversed her contempt adjudication because it concluded (633 F.2d at 277) that "all of the questions would seem to implicate her husband" in a kickback scheme. In *Hawkins*, the government had called the defendant's wife as a witness *against him* at his *trial*. That is the purest form of adverse spousal testimony, since the whole purpose of the witness's appearance is to aid the government in the prosecution of the witness's spouse. Obviously, a close scrutiny of the degree to which the prosecutor's questions might elicit testimony adverse to the spouse is unnecessary in such circumstances.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 388998 808